

Marshall (Migration) [2020] AATA 5593 (14 November 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Gemma Emnace Marshall

CASE NUMBER: 1913390

HOME AFFAIRS REFERENCE(S): BCC2018/455700

MEMBER: Christine Kannis

DATE: 14 November 2020

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2)(a) of Schedule 2 to the Regulations
- cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations
- cl.820.221(3)(b)(ii) of Schedule 2 to the Regulations
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Statement made on 14 November 2020 at 10.05am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – relationship ceased – compelling reasons to waive the Schedule 3 criteria – child of the relationship – relevant partner relationship had existed – applicant invested in the sponsor’s business – applicant cared for the sponsor’s child – evidence of joint travel and activities – child maintenance obligation – decision under review remitted

LEGISLATION

Child Support (Assessment) Act 1989
Family Law Act 1975

Migration Act 1958, ss 5, 65, 360

Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; Schedule 3; rr 1.15, 1.21

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Srour v MIMIA [2006] FCA 1228

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 27 January 2018 on the basis of her relationship with her sponsor, Mr Brent Marshall. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by the applicant. Relevantly to this matter the primary criteria include cl.820.211 and 820.221 which require that at the time of application and time of decision, the applicant is the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2)(a) and therefore did not meet cl.820.221. The evidence before the Tribunal indicates that the relationship has ceased and that the applicant seeks to rely upon the alternative criteria in cl.820.221, specifically cl.820.221(3)(b) (ii).
4. The delegate referred to the applicant submitting information regarding compelling reasons for not applying Schedule 3 criteria. The delegate did not assess these reasons because of the decision that the applicant did not meet cl.820.211(2)(a).
5. A copy of the Decision Record was submitted to the Tribunal by the applicant for the purposes of the review.
6. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of the applicant on the basis of the material before it, pursuant to s.360(2)(a) of the Act.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The applicant is a 36-year-old national of the Philippines. The sponsor was born in Australia in 1967. The applicant and the sponsor met on a dating website in 2015 and first met in person on 12 February 2016. On 15 November 2016 they were married. The applicant first arrived in Australia in December 2016 on a Subclass 600 visa. A child of the relationship was born on 27 March 2020.
9. The evidence before the Tribunal is that the relationship between the applicant and the sponsor ceased when they separated on or around 28 April 2020. The issue is whether, despite the relationship having ceased, the applicant is eligible for the grant of the visa. There are specific circumstances in which an applicant will be eligible for a Subclass 820 visa notwithstanding that the relationship between the applicant and the sponsoring partner has ceased. They are set out in cl.820.221(3) and relevant to the present case provide as follows:
 10. (3) An applicant meets the requirements of this subclause if:

11. (a) the applicant would continue to meet the requirements of subclause 820.211(2), (5) or (6) except that the relationship between the applicant and the sponsoring partner has ceased; and
12. (b) either or both of the following circumstances applies:
 13. (i) either or both of the following:
 14.
 15. (ii) the applicant:
 16. (A) has custody or joint custody of, or access to; or
 17. (B) has a residence order or contact order made under the *Family Law Act 1975* relating to;
 18. at least 1 child in respect of whom the sponsoring partner:
 19. (C) has been granted joint custody or access by a court; or
 20. (D) has a residence order or contact order made under the *Family Law Act 1975*; or
 21. (E) has an obligation under a child maintenance order made under the *Family Law Act 1975*, or any other formal maintenance obligation.
22. In order for the applicant to meet the requirements of cl.820.221(3), the Tribunal must be satisfied that the relevant partner relationship (i.e. spouse, de facto, or interdependent, as defined in the legislation) existed before it can be determined that the relationship 'has ceased'.
23. The delegate was not satisfied that the applicant and the sponsor were in a genuine and continuing relationship. The Tribunal was provided with documentary evidence including but not limited to a statutory declaration made by the applicant, bank statements, Facebook and SMS messages, a Birth Certificate and a Child Support Assessment.
24. The issue before the Tribunal is whether the parties were in a genuine spousal relationship prior to the cessation of their relationship and if so, whether certain circumstances exist, as provided for in cl.820.221(3).
25. Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the household and the persons' commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
26. A Certificate of Marriage issued by the Republic of the Philippines showing the parties were married on 15 November 2016 was provided. On this basis the Tribunal concludes that the marriage satisfies the requirements for a valid marriage for the purpose of the Act as required by s.5F(2)(a).
27. The Tribunal considered the r.1.15A(3) factors.

28. The Tribunal considered the evidence in relation to the financial aspects of the relationship. Bank statements for an account in the parties' joint names for periods during 2019 and 2020 were provided. The statements do not show any transactions and do not demonstrate any pooling of resources.
29. In a statutory declaration dated 2 November 2020, the applicant said prior to being granted work rights she was financially supported by the sponsor. She said once she started working she contributed to the household expenses by paying for groceries and expenses in relation to her stepson, the sponsor's three-year-old son from a previous relationship. The applicant said she invested \$6,000 in the sponsor's business expansion plans however the plans did not eventuate and the sponsor repaid the money by purchasing a car in her name. No documentary evidence to substantiate these claims was provided.
30. There was no evidence of joint ownership of assets, joint liabilities, any legal obligations owed to the other party, any pooling of financial resources or any sharing of day-to-day household expenses.
31. The Tribunal considered the evidence in relation to the nature of the household. During the parties' relationship the applicant claimed to have lived with the sponsor initially lived at Mauger Place, South Hedland WA and from early 2017, at Hollings Place, South Hedland WA. Correspondence addressed to the parties individually at these addresses was provided. The evidence before the Tribunal was that at the time of application the care of the applicant's stepson was shared with the child's mother and from December 2017, he lived with the applicant and the sponsor on a permanent basis. In her statutory declaration the applicant said she looked after her stepson and said she picked him up from school. A school Award of Merit in the applicant's stepson's name was provided. In the communication evidence provided the sponsor said the applicant helped the child in relation to being given the award.
32. In her statutory declaration the applicant said she shared a bedroom with the sponsor until the relationship ceased in April 2020. She said she was responsible for the majority of the housework including the cleaning, washing and cooking. She said the sponsor did not like helping with the housework.
33. The Tribunal finds the applicant and the sponsor shared accommodation and the care of the applicant's stepson prior to cessation of the relationship.
34. The Tribunal considered the evidence in relation to the social aspects of the relationship. Statutory declarations made by Mr Gavin Ness and Mr James Easton in January 2018 were provided to the Department. Mr Ness was a neighbour and friend of the parties. He said he interacted with the applicant and the sponsor on a daily basis and his reasons for his belief that their relationship was genuine and continuing included that they went fishing with him. Mr Ness said the applicant was a good stepmother to the sponsor's son. Mr Easton's reasons for his belief that the parties' relationship was genuine and continuing included that they had barbeques with him and fished with him. The reasons provided by Mr Ness and Mr Easton were general in nature and the Tribunal gives this evidence minimal weight.
35. In her statutory declaration the applicant said she and the sponsor were invited to birthday and wedding celebrations as a married couple. She said she said they holidayed together and referred to visiting the sponsor's family in Tasmania in December 2018. Evidence of joint travel with the applicant's stepson in December 2018 was provided.
36. Some evidence of joint activities including fishing with the applicant's stepson was provided.

37. There was limited independent evidence that the parties' represented themselves to other people as being married to each other.
38. The Tribunal considered the evidence in relation to the nature of persons' commitment to each other. The parties were married for more than three years prior to the cessation of the relationship. Evidence of Facebook and SMS messages sent during their relationship was provided to the Tribunal. This evidence shows the parties were in frequent contact with each other and the messages were often of an intimate nature. The messages showed discussion regarding day-to-day matters but also showed the parties provided each other with comfort and support in difficult times.
39. In her statutory declaration the applicant said she and the sponsor had their ups and downs and said when they argued they did not speak to each other for a few days and said it always ended with a "sorry" and they were "back to good". She said the reasons they argued included money and the sponsor's smoking and alcohol consumption.
40. The strongest indicator that the parties saw their relationship as long-term is that they have a child together.
41. The Tribunal finds that the parties saw their relationship as long term and that prior to cessation of relationship they provided companionship and support to each other.
42. The Tribunal has considered the documentary evidence and based on that evidence finds that prior to cessation of their relationship the applicant and the sponsor were married to each other under a marriage; they were not living separately and apart on a permanent basis and they saw their future as a long term one; they had a mutual commitment to a shared life together to the exclusion of others; and the relationship was genuine and continuing. The Tribunal notes the limited evidence in relation to the financial and social aspects of the relationship however these considerations are outweighed by the findings with respect to the nature of the parties' household and the nature of their commitment. Therefore, the Tribunal is satisfied that the requirements of s.5F(2) are met.
43. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) were met at the time of application up until the relationship ended in April 2020.

44. Is there a child in respect of whom the applicant and the sponsor have parental rights and obligations?

45. A Birth Certificate dated 27 May 2020 issued by the Registry of Births, Deaths and Marriages (WA) was provided. The document indicates that the applicant and the sponsor are the mother and father of a male child, Marco, born on 27 March 2020. On the basis of this evidence, the Tribunal finds there is a child of the relationship.
46. Clause 820.221(3)(b)(ii) allows for the grant of the visa where the relationship between the applicant and the sponsoring partner has ceased, and there is a child in respect of whom the applicant has custody, access, or a residence or contact order made under the *Family Law Act 1975*. The sponsor must also have these rights, or a child maintenance obligation.
47. The Federal Court in *Srouf v MIMIA* [2006] FCA 1228 held, in relation to the child exception, that an applicant can have a right to custody as an incident of the statutory imposition of parental responsibility by operation of the *Family Law Act 1975* in relation to a biological child and the sponsoring partner can have a formal maintenance obligation (though by operation of the *Child Support (Assessment) Act 1989* rather than the *Family Law Act*). Consequently, an applicant can meet the requirement to have custody of the child and the sponsoring partner can meet the requirement of having a 'formal maintenance obligation' in

respect of the child by virtue of the general law obligations of a biological parent to his/her child, provided there is no court order which contradicts their relevant general law obligations.

48. In this case there is no evidence of court orders concerning custody, residence, access or contact contradicting the general law provisions. There is evidence of a Child Support Assessment obligation payable by the sponsor to the applicant for Marco. Accordingly, the Tribunal finds that the applicant and the sponsor have custody rights and the sponsor has a child maintenance obligation in respect of their child. The applicant therefore meets cl.820.221(3)(b)(ii).

49. Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

50. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
51. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

52. Criterion 3001

53. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision. The applicant was granted a Subclass 600 visa which ceased on 24 January 2018. The applicant applied for the partner visa which is the subject of this review on 27 January 2018. For the purpose of consideration of Schedule 3 criterion, 24 January 2018 is the relevant day. As the visa application was made within 28 days of the relevant day, the applicant satisfies criterion 3001.

54. Criterion 3003

55. Criterion 3003 only applies to applicants who have not, on or after 1 September 1994, been the holder of a substantive visa, and on 31 August 1994 was either an illegal entrant or the holder of an entry permit that was not valid beyond that date. The Tribunal is satisfied that the applicant was not such a person, and accordingly criterion 3003 does not apply.

56. Criterion 3004

57. Criterion 3004 of Schedule 3 requires that the Minister be satisfied that the applicant is not the holder of a substantive visa because of factors beyond his or her control, that there are compelling reasons for granting the visa, and that the applicant has complied substantially with the conditions applicable to the last of any substantive visas and any subsequent bridging visa held by the applicant. In addition, the Minister must be satisfied that the applicant would have been able to be granted the visa if the applicant had applied on the day he or she last held a substantive or criminal justice visa; or would have satisfied the criteria when he or she last entered Australia unlawfully; that the applicant intends to comply with any conditions of the visa; and the last visa or entry permit held (if any) was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or further entry permit, while the holder remained in Australia.

58. The applicant held a substantive visa that ceased on 24 January 2018, and therefore meets criterion 3004 (a). The applicant did not enter Australia unlawfully, and does not satisfy (b), which is an alternative to (a). Criterion 3000(c) requires that the applicant is not the holder of a substantive visa because of factors beyond her control. The only information provided to the Tribunal with respect to the reason for the applicant not holding a substantive visa at the time of lodging the Partner visa application was that the applicant and the sponsor did not have access to sufficient funds. In the absence of any other evidence, the Tribunal is not satisfied that the factors that caused the applicant to become a person without a substantive visa were factors beyond her control. As such the applicant does not meet criterion 3004(c).
59. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
60. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32. The decision in *Waensila* means that a decision maker is not confined to having regard to circumstances that amount to compelling reasons only at the time of application and that the applicant's circumstances as a whole are to be taken into account.
61. The Tribunal notes that the Explanatory Statement to Statutory Rules 1996, No 75 which accompanied the introduction of the provisions gave two examples of circumstances in which a waiver **may** be justified (Tribunal's emphasis). One of these examples is that there are Australian-citizen children from the relationship.
62. The applicant has submitted evidence that there is a child of the relationship. The Tribunal accepts that the child is the biological son of the applicant and the sponsor. Accordingly, the Tribunal is satisfied that there is an Australian-citizen child of the relationship. At the time of this decision, the child is eight months old. The Tribunal considers the fact that there is an infant Australia-citizen child of the relationship is a compelling reason in this particular case to waive the Schedule 3 criteria. In making this determination the Tribunal has taken into account that if the applicant is required to depart Australia, it is likely the Australian citizen child will also depart given his young age.
63. The Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).
64. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

65. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2)(a) of Schedule 2 to the Regulations
 - cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations
 - cl.820.221(3)(b)(ii) of Schedule 2 to the Regulations

Christine Kannis
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

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ATTACHMENT – EXTRACTS FROM THE MIGRATION REGULATIONS 1994

1.21 Interpretation

...

non-judicially determined claim of family violence has the meaning given by subregulations 1.23(8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
- (b) a member of the family unit of the alleged victim; or
- (c) a member of the family unit of the alleged perpetrator; or
- (d) the property of the alleged victim; or
- (e) the property of a member of the family unit of the alleged victim; or
- (f) the property of a member of the family unit of the alleged perpetrator;

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

...

violence includes a threat of violence.

...

1.23 When is a person taken to have suffered or committed family violence?

- (1) For the purposes of these Regulations:
 - (a) a person (the alleged victim) is taken to have suffered family violence; and
 - (b) another person (the alleged perpetrator) is taken to have committed family violence in relation to the alleged victim.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

- (2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the Family Law Act 1975 against the alleged perpetrator.
- (3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

Circumstances in which family violence is suffered and committed — court order

- (4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and
 - (b) [...] order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.
- (5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — conviction

- (6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:
 - (a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

- (b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.
- (7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — non-judicially determined claim of family violence

- (8) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
 - (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.
- (9) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
 - (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim is:
 - (i) a spouse or de facto partner of the alleged perpetrator; or
 - (ii) a dependent child of:
 - (A) the alleged perpetrator; or
 - (B) the spouse or de facto partner of the alleged perpetrator; or
 - (C) both the alleged perpetrator and his or her spouse or de facto partner; or
 - (iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and
 - (c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:
 - (i) the alleged victim has suffered relevant family violence; and
 - (ii) the alleged perpetrator committed that relevant family violence.
- (10) If an application for a visa includes a non-judicially determined claim of family violence:
 - (a) the Minister must consider whether the alleged victim has suffered relevant family violence; and
 - (b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and
 - (c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:
 - (i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and
 - (ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.
- (11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) an application for a visa includes a non-judicially determined claim of family violence; and
 - (b) the Minister is satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.
- (12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.
- (13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) an application for a visa includes a non-judicially determined claim of family violence; and

- (b) the Minister is required by subparagraph (10)(c)(ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.
- (14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

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